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Attorneys for Defendant
FORTINET, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ENRICO GARGALE,)	CASE NO.: CV-08-3167-JF
)	
Plaintiff,)	STIPULATED PROTECTIVE ORDER
)	AS MODIFIED (IN SECTION 12)
v.)	BY THE COURT
)	
FORTINET, INC. and DOES 1 through 50,)	
)	
)	
Defendants.)	
)	
)	
)	

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than this litigation would be warranted.
5 Accordingly, the parties hereby stipulate to and petition the Court to enter the following
6 Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket
7 protections on all disclosures or responses to discovery and that the protection it affords extends
8 only to the limited information or items that are entitled to treatment as confidential under the
9 applicable legal principles. The parties further acknowledge, as set forth in Section 10, below,
10 that this Stipulated Protective Order creates no entitlement to file confidential information under
11 seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the
12 standards that will be applied when a party seeks permission from the court to file material under
13 seal.

14 2. DEFINITIONS

15 2.1 Party: any party to this action, including all of its officers, directors,
16 employees, consultants, retained experts, and outside counsel (and their support staffs).

17 2.2 Disclosure or Discovery Material: all items or information, regardless of
18 the medium or manner generated, stored, or maintained (including, among other things,
19 testimony, transcripts, or tangible things) that are produced or generated in disclosures or
20 responses to discovery in this matter.

21 2.3 Confidential Information or Items: information (regardless of how
22 generated, stored or maintained) or tangible things that qualify for protection under standards
23 developed under Federal Rule of Civil Procedure 26(c).

24 2.4 Receiving Party: a Party that receives Disclosure or Discovery Material
25 from a Producing Party.

26 2.5 Producing Party: a Party or non-party that produces Disclosure or
27 Discovery Material in this action.
28

1 2.6 Designating Party: a Party or non-party that designates information or
2 items that it produces in disclosures or in responses to discovery as “Confidential.”

3 2.7 Protected Material: any Disclosure or Discovery Material that is
4 designated as “Confidential.”

5 2.8 Outside Counsel: attorneys who are not employees of a Party but who are
6 retained to represent or advise a Party in this action (as well as their support staffs).

7 2.9 House Counsel: attorneys who are employees of a Party (as well as their
8 support staffs).

9 2.10 Counsel (without qualifier): Outside Counsel and House Counsel (as well
10 as their support staffs).

11 2.11 Expert: a person with specialized knowledge or experience in a matter
12 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
13 witness or as a consultant in this action and who is not a past or a current employee of a Party or
14 of a competitor of a Party and who, at the time of retention, is not anticipated to become an
15 employee of a Party or a competitor of a Party. This definition includes a professional jury or
16 trial consultant retained in connection with this litigation.

17 2.12 Professional Vendors: persons or entities that provide litigation support
18 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
19 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
20 subcontractors.

21 3. SCOPE

22 The protections conferred by this Stipulation and Order cover not only Protected Material
23 (as defined above), but also any information copied or extracted therefrom, as well as all copies,
24 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by
25 parties or counsel to or in court or in other settings that might reveal Protected Material.

26 4. DURATION

27 Even after the termination of this litigation, the confidentiality obligations imposed by
28 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court

1 order otherwise directs.

2 5. DESIGNATING PROTECTED MATERIAL

3 5.1 Exercise of Restraint and Care in Designating Material for Protection.

4 Each Party or non-party that designates information or items for protection under
5 this Order must take care to limit any such designation to specific material that qualifies under
6 the appropriate standards. A Designating Party must take care to designate for protection only
7 those parts of material, documents, items, or oral or written communications that qualify – so
8 that other portions of the material, documents, items, or communications for which protection is
9 not warranted are not swept unjustifiably within the ambit of this Order.

10 Mass, indiscriminate, or routinized designations are prohibited. Designations that
11 are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to
12 unnecessarily encumber or retard the case development process, or to impose unnecessary
13 expenses and burdens on other parties), expose the Designating Party to sanctions.

14 If it comes to a Party's or a non-party's attention that information or items that it
15 designated for protection do not qualify for protection at all, or do not qualify for the level of
16 protection initially asserted, that Party or non-party must promptly notify all other parties that it
17 is withdrawing the mistaken designation.

18 5.2 Manner and Timing of Designations. Except as otherwise provided in this
19 Order (see, e.g., second paragraph of Section 5.2(a), below), or as otherwise stipulated or
20 ordered, material that qualifies for protection under this Order must be clearly so designated
21 before the material is disclosed or produced.

22 Designation in conformity with this Order requires:

23 (a) for information in documentary form (apart from transcripts of
24 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
25 "CONFIDENTIAL" on each page that contains protected material. If only a portion or portions
26 of the material on a page qualifies for protection, the Producing Party also must clearly identify
27 the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify,
28 for each portion, the protection being asserted (e.g., "CONFIDENTIAL").

1 A Party or non-party that makes original documents or materials available
2 for inspection need not designate them for protection until after the inspecting Party has
3 indicated which material it would like copied and produced. During the inspection and before the
4 designation, all of the material made available for inspection shall be deemed
5 “CONFIDENTIAL.” After the inspecting Party has identified the documents it wants copied and
6 produced, the Producing Party must determine which documents, or portions thereof, qualify for
7 protection under this Order, then, before producing the specified documents, the Producing Party
8 must affix the appropriate “CONFIDENTIAL” legend on each page that contains Protected
9 Material. If only a portion or portions of the material on a page qualifies for protection, the
10 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
11 markings in the margins) and must specify, for each portion, the protection being asserted (e.g.,
12 “CONFIDENTIAL”).

13 (b) for testimony given in deposition or in other pretrial or trial
14 proceedings, that the Party or non-party offering or sponsoring the testimony identify all
15 protected testimony, and further specify any portions of the testimony as to which protection is
16 sought, and to specify the protection being asserted (e.g., “CONFIDENTIAL”), either on the
17 record, before the close of deposition hearing or other proceeding, or within 20 days after the
18 receipt of the testimony transcript.

19 Transcript pages containing Protected Material must be separately bound
20 by the court reporter, who must affix to the top of each such page the “CONFIDENTIAL”
21 legend as instructed by the Party or non-party offering or sponsoring the witness or presenting
22 the testimony.

23 (c) for information produced in some form other than documentary,
24 and for any other tangible items, that the Producing Party affix in a prominent place on the
25 exterior of the container or containers in which the information or item is stored the
26 “CONFIDENTIAL” legend. If only portions of the information or item warrant protection, the
27 Producing Party, to the extent practicable, shall identify the protected portions, specifying
28 whether they qualify as “CONFIDENTIAL.”

1 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
2 failure to designate qualified information or items as “CONFIDENTIAL” does not, standing
3 alone, waive the Designating Party’s right to secure protection under this Order for such
4 material. If material is appropriately designated as “CONFIDENTIAL” after the material was
5 initially produced, the Receiving Party, on timely notification of the designation, must make
6 reasonable efforts to assure that the material is treated in accordance with the provisions of this
7 Order.

8 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

9 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party’s
10 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
11 economic burdens, or a later significant disruption or delay of the litigation, a Party does not
12 waive its right to challenge a confidentiality designation by electing not to mount a challenge
13 promptly after the original designation is disclosed.

14 6.2 Meet and Confer. A Party that elects to initiate a challenge to a
15 Designating Party’s confidentiality designation must do so in good faith and must begin the
16 process by conferring directly (in voice-to-voice dialogue; other forms of communication are not
17 sufficient) with counsel for the Designating Party. In conferring, the challenging Party must
18 explain the basis for its belief that the confidentiality designation was not proper and must give
19 the Designating Party an opportunity to review the designated material, to reconsider the
20 circumstances, and, if no change in designation is offered, to explain the basis for the chosen
21 designation. A challenging Party may proceed to the next stage of the challenge process only if
22 it has engaged in this meet and confer process first.

23 6.3 Judicial Intervention. A Party that elects to press a challenge to a
24 confidentiality designation, after considering the justification offered by the Designating Party,
25 may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule
26 79-5, if applicable) that identifies the challenged material and sets forth in detail the basis for the
27 challenge. Each such motion must be accompanied by a competent declaration that affirms that
28 the movant has complied with the meet and confer requirements imposed in the preceding

1 paragraph and that sets forth with specificity the justification for the confidentiality designation
2 that was given by the Designating Party in the meet and confer dialogue.

3 The burden of persuasion in any such challenge proceeding shall be on the
4 Designating Party. Until the Court rules on the challenge, all parties shall continue to afford the
5 material in question the level of protection to which it is entitled under the Producing Party's
6 designation.

7 7. ACCESS TO AND USE OF PROTECTED MATERIAL

8 7.1 Basic Principles. A Receiving Party may use Protected Material that is
9 disclosed or produced by another Party or by a non-party in connection with this case only for
10 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
11 disclosed only to the categories of persons and under the conditions described in this Order.
12 When the litigation has been terminated, a Receiving Party must comply with the provisions of
13 Section 11 (FINAL DISPOSITION), below.

14 Protected Material must be stored and maintained by a Receiving Party at a
15 location and in a secure manner that ensures that access is limited to the persons authorized
16 under this Order.

17 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless
18 otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving
19 Party may disclose any information or item designated CONFIDENTIAL only to:

20 (a) the Receiving Party's Outside Counsel of record in this action
21 which has signed the "Agreement to Be Bound by Protective Order" that is attached hereto as
22 Exhibit A, as well as employees and professional vendors of said Counsel to whom it is
23 reasonably necessary to disclose the information for this litigation;

24 (b) the officers, directors, and employees (including House Counsel)
25 of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who
26 have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

27 (c) experts (as defined in this Order) of the Receiving Party to whom
28 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be

1 Bound by Protective Order” (Exhibit A);

2 (d) the Court and its personnel;

3 (e) court reporters and their staffs to whom disclosure is reasonably
4 necessary for this litigation and who have signed the “Agreement to Be Bound by Protective
5 Order” (Exhibit A);

6 (f) during their depositions, witnesses in the action to whom
7 disclosure is reasonably necessary and who have signed the “Agreement to Be Bound by
8 Protective Order” (Exhibit A). Pages of transcribed deposition testimony or exhibits to
9 depositions that reveal Protected Material must be separately bound by the court reporter and
10 may not be disclosed to anyone except as permitted under this Stipulated Protective Order; and

11 (g) the author of the document or the original source of the
12 information, and persons who were recipients of the document prior to its production by the
13 Producing Party to the Receiving Party.

14 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
15 OTHER LITIGATION

16 If a Receiving Party is served with a subpoena or an order issued in other litigation that
17 would compel disclosure of any information or items designated in this action as
18 “CONFIDENTIAL,” the Receiving Party must so notify the Designating Party, in writing (by e-
19 mail or fax, if possible) immediately and in no event more than three court days after receiving
20 the subpoena or order. Such notification must include a copy of the subpoena or court order.

21 The Receiving Party also must immediately inform in writing the Party who caused the
22 subpoena or order to issue in the other litigation that some or all the material covered by the
23 subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must
24 deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that
25 caused the subpoena or order to issue.

26 The purpose of imposing these duties is to alert the interested parties to the existence of
27 this Protective Order and to afford the Designating Party in this case an opportunity to try to
28 protect its confidentiality interests in the court from which the subpoena or order issued. The

1 Designating Party shall bear the burdens and the expenses of seeking protection in that court of
2 its confidential material – and nothing in these provisions should be construed as authorizing or
3 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

4 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

5 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
6 Material to any person or in any circumstance not authorized under this Stipulated Protective
7 Order, the Receiving Party must immediately: (a) notify in writing the Designating Party of the
8 unauthorized disclosures; (b) use its best efforts to retrieve all copies of the Protected Material;
9 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of
10 this Order; and (d) request such person or persons to execute the “Acknowledgment and
11 Agreement to Be Bound” that is attached hereto as Exhibit A.

12 10. FILING PROTECTED MATERIAL

13 Without written permission from the Designating Party or a court order secured after
14 appropriate notice to all interested persons, a Party may not file in the public record in this action
15 any Protected Material. A Party that seeks to file under seal any Protected Material must comply
16 with Civil Local Rule 79-5.

17 11. FINAL DISPOSITION

18 Unless otherwise ordered or agreed in writing by the Producing Party, within sixty days
19 after the final termination of this action, each Receiving Party must either destroy or return all
20 Protected Material to the Producing Party. As used in this subdivision, “all Protected Material”
21 includes all copies, abstracts, compilations, summaries or any other form of reproducing or
22 capturing any of the Protected Material. Whether the Protected Material is returned or destroyed,
23 the Receiving Party must submit a written certification to the Producing Party (and, if not the
24 same person or entity, to the Designating Party) by the sixty day deadline that identifies (by
25 category, where appropriate) all the Protected Material that was returned or destroyed and that
26 affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries
27 or other forms of reproducing or capturing any of the Protected Material. Notwithstanding this
28 provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers,

1 transcripts, legal memoranda, correspondence or attorney work product, even if such materials
 2 contain Protected Material. Any such archival copies that contain or constitute Protected
 3 Material remain subject to this Protective Order as set forth in Section 4 (DURATION), above.

4 12. INADVERTENT PRODUCTION OF PRIVILEGED MATERIAL

5 Inadvertent production or disclosure of documents or information subject to the attorney-
 6 client privilege, work product immunity, or any other applicable privilege shall not automatically
 7 constitute a waiver of any claim – in this or any other proceeding – that such or related
 8 material is privileged or protected by the work product immunity or any other applicable
 9 privilege, provided that the Producing Party notifies the Receiving Party in writing within a
 10 reasonable time after discovery of such inadvertent production. Upon receipt of such notice, all
 11 other Parties shall, regardless of whether they agree with the Producing Party's claim of privilege
 12 or protection, promptly: (a) destroy or segregate all copies of the inadvertently produced
 13 documents or material in such Party's possession, custody, or control, and notify the Producing
 14 Party that it has done so; and (b) notify the Producing Party that reasonable steps have been
 15 taken to retrieve and/or destroy the inadvertently produced documents or material from other
 16 persons to whom such documents or material have been provided, if any, consistent with Rule
 17 26(b)(5)(B).

18 Compliance with this Section 12 does not, and shall not be deemed to, constitute
 19 agreement that the claimed document or material is in fact privileged or entitled to protection or
 20 immunity, and the Receiving Party may move the Court for an Order compelling production of
 21 any inadvertently produced document or information. In opposing any such motion, the Producing
 22 Party has the burden of showing that it took efforts that were "reasonably designed" to protect the
 23 privileged materials. *See Gomez v. Vernon*, 255 F.3d 1118, 1131-32 (9th Cir. 2001).

24 13. MISCELLANEOUS

25 13.1 Right to Further Relief. Nothing in this Order abridges the right of any
 26 person to seek its modification by the Court in the future.

27 13.2 Right to Assert Other Objections. By stipulating to the entry of this
 28 Protective Order no Party waives any right it otherwise would have to object to disclosing or

1 producing any information or item on any ground not addressed in this Stipulated Protective
2 Order. Similarly, no Party waives any right to object on any ground to the use in evidence of any
3 of the material covered by this Protective Order.

4 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

5
6 Dated: March 27, 2009

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7 By: /s/ Michael C. Osborne
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9
10
11 Dated: March 27, 2009


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12 By: /s/ Jenny L. Dixon
Jenny L. Dixon
Counsel for Defendant Fortinet, Inc.

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19 **ORDER**

20 For good cause appearing, the foregoing stipulation regarding confidentiality is approved
21 as modified (in Section 12) by the court. **IT IS SO ORDERED.**

22 Dated: 4/1/09



23 THE HONORABLE PATRICIA V. TRUMBULL
24 United States Magistrate Judge
25
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27
28

EXHIBIT A

ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Northern District of California on _____, 2009 in the case of *Gargale v. Fortinet, et al.*, CV 08-3167-JF. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name _____
[printed name]

Signature: _____
[signature]